Filed 12/17/20 In re A.B. CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.B., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. C.B., Defendant and Appellant.	A159641 (Alameda County Super. Ct. No. JD03057101)

C.B. (Father), the father of minor A.B., appeals from the juvenile court's order denying Father's modification petition seeking custody and placement of A.B. with him. (Welf. & Inst. Code, § 388.)[1] Father contends the court erred in failing to evaluate his petition under section 361.2, subdivision (a), which provides for placement with a noncustodial parent unless the court finds that doing so would be detrimental to the minor. He

[1] Undesignated statutory references are to the Welfare and Institutions Code.

further argues the court's summary denial of his modification petition deprived him of due process. We reject these contentions and affirm.

I. BACKGROUND

A. *The Petition and Detention*

On January 2, 2019, the Alameda County Social Services Agency (Agency) filed a dependency petition, alleging three-year-old A.B. and her four-month-old brother T.G.[2] came within section 300, subdivisions (b) (failure to protect), and (g) (no provision for support). The petition alleged that J.G., the minors' mother (Mother), yelled and screamed at A.B.; dragged her by the arm; hit her on her head and body when she wet or soiled herself or did not follow Mother's directions; and put A.B. to sleep without providing her an evening meal. Mother also allegedly stated that A.B. "makes her feel like killing [A.B.], like the mother in Florida, Casey Anthony, who killed her daughter." After hearing this, A.B. "started walking back and forth and banging her head against the wall." Mother, who allegedly suffered from untreated mental health symptoms, left the minors with a family friend, Patricia G. (Patricia), on December 22, 2018. When she returned days later, she collected her belongings and left again. Mother did not respond to phone calls or text messages regarding the children. On December 28, 2018, Mother stated she was in Los Angeles.

The petition further alleged that C.B. is A.B.'s father, whose whereabouts and ability and willingness to provide care for A.B. were unknown.

On January 3, 2019, the court ordered the minors detained.

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[2] T.G. is not a party to this appeal.

B. *Jurisdiction and Disposition*

Prior to the jurisdiction and disposition hearing, the Agency reported it had performed a search for Father, who allegedly lived in Florida, but could not locate him. The Agency also reported that Mother is originally from Florida and previously had experienced domestic violence during her relationship with Father.

The report also noted that Mother left the children with Patricia, whom Mother considers to be her aunt. Mother explained she needed to leave Patricia's home because she was not "coping well." Patricia shared that "she would love to help care for the children in her home." She had implemented a consistent daily routine for A.B., who responded well to the structure. A.B. also had fewer tantrums and episodes of rocking back and forth to soothe herself and stopped banging her head against the wall.

The Agency recommended that the court find true the petition allegations and that Mother be offered family reunification services.

The Agency prepared an addendum report, which provided an update on Mother's living situation and efforts to receive mental health treatment. Mother explained she had been diagnosed with posttraumatic stress disorder, attention deficit hyperactivity disorder, and bipolar disorder with anxiety. Mother also informed the Agency that A.B. was previously evaluated and was told she had signs of autism and a speech delay.

In an additional addendum report, the Agency noted on February 7, 2019, it performed a search for Father, whose whereabouts remained unknown.

On February 28, 2019, the Agency filed the first amended petition, alleging it had recently learned of T.G.'s alleged father; Father's whereabouts were still unknown.

The Agency prepared another addendum report recommending the court sustain the allegations of the first amended petition. The Agency reported that Patricia had been working closely with A.B.'s therapist to help A.B. develop healthy boundaries. Patricia explained to the Agency that A.B. continued to do well with the structure and patience offered by Patricia. The Agency determined "[t]he children are doing well in the care of [Patricia]."

The jurisdiction and disposition hearing was conducted on April 15, 2019.[3] The court found true the allegations in the first amended petition and adjudged A.B. to be a dependent.

C. *The Six-month Review Hearing*

Father contacted the Agency on August 27, 2019, explaining "that until the previous day, he had no idea [A.B.] was in foster care." Shortly thereafter, Father's prospective attorney filed an application requesting counsel be appointed to Father, and a hearing on the issue was held. Father was appointed counsel, who then requested Father's status be elevated to presumed father. Neither Mother nor Father were present at the hearing and accordingly, the court denied the request for presumed father status. The court also determined no paternity inquiry had been made.

In its status review report dated September 30, 2019, the Agency noted Father asked "how he could get his child, what led to her being in foster care, and if she was safe now." Father stated he had been paying child support on behalf of A.B. and that Mother sends him pictures of A.B. to let him know she is in Mother's care.

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[3] The minute order for the April 15, 2019 jurisdiction and disposition hearing mistakenly notes that Father was present. Father apparently did not learn about the dependency proceeding until August 2019. He appeared for the first time through counsel at the September 18, 2019 hearing on his request to be appointed counsel and for a determination of parentage.

Father reported he had served time in prison for possessing a firearm when A.B. was approximately one year old and that he had been out of prison for one year. He was previously on probation and had taken parenting and anger management classes. Father reportedly had been physically and verbally aggressive towards Mother in the past. Father stated he had medical issues, including a recent blood clot, and was awaiting approval of disability benefits application. Father reported he had ten children (although he reported other times he had different numbers of children), four of whom lived with him, along with his aunt.

The Agency reported that A.B. and Father began exchanging phone calls, which were going well. The Agency, however, was concerned that Father lived far from A.B. and had little contact with her over the past three years. Although the two were creating a relationship, moving to live with Father "would be a big change for [A.B.], who already has demonstrated significant attachment needs." The Agency also expressed concern about Father's previous violence toward Mother that had caused her to leave Florida. His violent history was "concerning as [Father] would be unable to receive Family Maintenance services and the Agency would have no oversight if [A.B.] was returned in Florida." Thus, Father "need[ed] to come to California to be raised to presumed father and engage with the Agency in order for the Agency to assess his needs so that [it] is able to provide him with family reunification services." The Agency noted it would request records of Father's criminal history and probation requirements.

The Agency recommended that the children remain dependents and that reunification services to Mother be discontinued. Father agreed to terminating Mother's services but expressed he "would like [A.B.] to come live with him now." The Agency recommended providing services to Father if he

was raised to presumed father status. The Agency also recommended the court find "[t]here is clear and convincing evidence that placement with [Father], the non-custodial parent . . . would be detrimental to [A.B.'s] safety, protection, or physical or emotional well-being."

On October 7, 2019, Father filed a "Statement Regarding Parentage" (JV-505 form) requesting an order to enter a judgment of his parentage of A.B. Father stated he had already established parentage of A.B. in a Florida court case for child support, which he had been paying. He also stated he was present at the birth of A.B., who lived with him, his grandmother, and his other children for about one year. Mother, who was "running state to state" at that time, left A.B. with Father. Father also took A.B. to her first well visit. The juvenile court subsequently raised Father's status to that of presumed father and ordered reunification services be provided to him.

The Agency filed an addendum report that noted Father and the Agency spoke about creating a case plan for Father. Father reported he used marijuana daily—"three joints a day"—for pain management but did not have a medical marijuana card because he was on probation until August 2019. Father also had been convicted for possession for sale of cocaine. He also had prior arrests for domestic violence incidents in 1999, 2001, 2003, 2005, 2009, 2012, 2013, 2014, 2015, and 2016, but stated it "would not happen again." When asked what he would do to prevent another incident, Father "stated that he would walk away" but did not specify how he could manage conflict in a nonphysical way.

The Agency also reported that Mother recently had moved to Florida and did not intend to return to California. By then, Mother was in contact with Father and had been calling him "hundreds of times."

The six-month review hearing was held on November 19, 2019. The court admitted the Agency's status review and addendum reports into evidence. The court adopted the Agency's recommendations and ordered that reunification services to Mother be terminated.

As to Father, the court noted that his progress in mitigating the causes necessitating A.B.'s placement had been partial. The court then determined "[t]here is clear and convincing evidence that placement with [Father], the non-custodial parent of the child, would be detrimental to the child's safety, protection or physical or emotional well-being." The court ordered reunification services for Father and Mother and supervised visitations for Father. Father was also ordered to cooperate with the Agency and participate in all aspects of the case plan.

At the hearing, Father's counsel stated her "client is in agreement with FR [family reunification] services being offered to him." Counsel explained that "[a] referral has been made for domestic violence treatment in Florida and my client is eager to get that started so he can get . . . reunification with [A.B.] going as soon as possible."

The court scheduled the 12-month permanency review hearing for January 28, 2020.

D. ***The 12-month Review Hearing***

In its 12-month review report, the Agency outlined Father's court-ordered case-plan, which, among other things, required Father to stay free from illegal drugs and drug dependency; comply with all required drug tests; build and maintain relationship with A.B. to support her mental health and emotional needs; and learn and use non-violent and non-threatening methods of resolving conflict.

The Agency reported that Father had spoken with A.B.'s therapist over the phone on several occasions. During one call, Father hung up on the therapist. On another call, Father was notably agitated and " 'ranted and raved' " at the therapist about what the Agency was requiring him to do. Father ended the conversation, stating, " 'I'm going to look for something to eat I don't want to talk to you anymore.' " Father also did not seem interested in hearing about A.B.'s mental health issues, repeatedly stating "that everything would be fine if he got [A.B.] back to Florida." Father also reported that he was scheduled to start parenting classes but did not provide the Agency with the schedule or any other information about the class facilitators.

Concerning Father's substance use, the Agency reported it did not receive an update on Father's substance use assessment from a local recovery center. Noting that possession of marijuana without a medical prescription is unlawful in Florida and a conviction for possession can carry punishment of up to one year in jail or a $1,000 fine (Fla. Stats. Ann., §§ 775.082(4)(a), 775.083(1)(d), 893.13(6)(b)), the Agency was concerned that Father's marijuana use placed him at risk for rearrest. It thus encouraged Father to speak with his doctors to explore legal pain management options. Father also could not identify a plan for ensuring that A.B. would be cared for by a safe and sober adult when he used marijuana. Although he stated he would rely on his family to help him, he did not specify any family members, much less ensure their commitment to caring for A.B. under those circumstances. Father also maintained he did not have a substance use problem.

With respect to Father's domestic violence history, the Agency noted Father had not provided a certificate for completing domestic violence classes, despite the Agency's repeated requests for it. Father reported he was

frustrated with Mother, who had been calling him repeatedly to get A.B., including once from a mental health hospital, where she told staff that Father was her husband. The Agency instructed Father to ignore Mother's calls and block contact with her. It observed that Father struggled to set boundaries on phone calls with Mother and had not demonstrated or verbalized how he would manage conflict with Mother or others. The Agency expressed concern that Father lived close to Mother at that time "and has not been able to demonstrate an understanding that [Mother] is not well and is not to be trusted with [A.B.]" When asked how he would keep A.B. safe from domestic violence, Father stated he would take "classes to teach him to manage domestic violence and walk away." Afterwards, however, he asked the Agency facilitator why these classes were necessary and interrupted her when she tried to answer the question.

The Agency also reported that while Father believed A.B. "would be fine as long as she was with him," he did not acknowledge "that this transition would likely cause a significant regression for [A.B.], who needs intensive mental health therapy and constant attention due to her trauma and attachment history." In addition, Father was not open to receiving feedback from A.B.'s therapist.

The Agency, however, credited Father's active engagement with the Agency and his classes. Father regularly spoke with A.B. over the phone and visited her several times in November and December 2019. After Father's initial phone calls, A.B. regressed in toilet training and began to wet herself again. However, she stopped doing so after approximately one month. The Agency observed that Father engaged well with A.B., who had grown attached to him. Father also began acknowledging A.B.'s needs for ongoing mental health services and expressed his commitment to maintaining these

services if A.B. returns to his care. Father also had developed a relationship with Patricia, who advocated for Father to maintain a relationship with A.B. and advised him on how to navigate the California child welfare system.

The Agency further reported that A.B. had progressed in her current placement. "She has been speaking exponentially more than she was when she came into care and has made significant progress in understanding boundaries and asking for what she needs."

The Agency recommended the court find that Father's progress in mitigating the causes necessitating placement had been partial and that, by a preponderance of the evidence, returning A.B. with Father would create a substantial risk of detriment to A.B.'s safety.

E. ***Father's Section 388 Petition***

On January 27, 2020, Father filed a JV-180 form petition pursuant to section 388 requesting an order to place A.B. with him, or, alternatively, to terminate jurisdiction and dismiss the dependency petition. Father argued that the court's and parties' new knowledge of his whereabouts was a change of circumstances requiring modification of the prior orders.

Father filed a memorandum of points and authorities in support of the petition, contending that his status as a noncustodial parent seeking custody of A.B. was a sufficient prima facie showing that placement with Father would serve A.B.'s best interests. Father filed a declaration in which he stated that he is A.B.'s father, that A.B. had lived with him in Florida until she was approximately a year old, and that he had been ordered by a Florida court to pay child support for A.B. Father attached the child support order to his declaration.

On January 28, 2020, the court held the 12-month review hearing. The court stated that because it only received the section 388 petition the

previous day, it needed more time to review it, and thus would not issue a ruling at that time. In response to Father's request for a hearing on the petition, the court stated, "[t]hat's what the Court has to decide, whether I should even set one. . . . Because on the moving papers alone, the Court can deny the request." Father's counsel replied, "Yes, I understand that, your Honor." Counsel then requested the court to "set the 20-month review hearing for contest in the meantime." The court set a contested hearing for April 3, 2020.

On January 30, 2020, the court issued its order denying Father's section 388 petition, on the ground it did not state new evidence of a change of circumstances. This appeal followed.

II. DISCUSSION

Father argues the juvenile court erred in denying his section 388 petition for custody of A.B. He contends that because he was a noncustodial parent, the court should have assessed his petition under section 361.2, subdivision (a), not section 388, which required him to show a change of circumstances or new evidence justifying a change of a prior order (§ 388, subd. (a)). Additionally, Father contends that the court's denial of his petition without a hearing deprived him of due process. We disagree with these contentions.

A. *General Legal Principles*

Section 361.2, subdivision (a) governs placement of a dependent child with a noncustodial parent. It provides: "If a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent

requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) The party opposing placement must prove detriment by clear and convincing evidence. (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1400–1401.)

Our Supreme Court held that section 361.2, subdivision (a) by its plain language applies only when the minor is first removed from the custodial parent, generally at disposition: "Nothing in this statute suggests that custody must be immediately awarded to a noncustodial parent regardless of when in the dependency process the parent comes forward. Rather, its language suggests that the statute is applicable only at the time the child is first removed from the custodial parent or guardian's home." (*In re Zacharia D.* (1993) 6 Cal.4th 435, 453.)

Although section 361.2 normally does not apply after initial removal of a child at the disposition hearing (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 453), several courts have created exceptions to this general rule and have applied section 361.2 to noncustodial parents' requests for custody made after the disposition hearing. (See, e.g., *In re Jonathan P.* (2014) 226 Cal.App.4th 1240, 1255–1256 (*Jonathan P.*); *In re Suhey G.* (2013) 221 Cal.App.4th 732, 744–745 (*Suhey G.*).) Those cases, however, involved noncustodial parents who appeared for the first time after the disposition at no fault of their own, either because the social services agency failed to adequately search for the parent (*Jonathan P.*, *supra*, at p. 1255) or "to properly serve [the parent,] depriv[ing] him of the opportunity to appear at the disposition hearing and obtain custody under the section 361.2 framework" (*Suhey G.*, *supra*, at pp. 744–745).

Also, in *In re Liam L.* (2015) 240 Cal.App.4th 1068 (*Liam L.*), the noncustodial father was present at the disposition hearing, but no detriment finding was made, and it was not until the 12-month review hearing that custody was sought. (*Id.* at pp. 1077, 1082.) Under these circumstances, the court concluded that the noncustodial father could seek placement by means of a section 388 petition to change, modify, or set aside a previous order based on a change of circumstances or new evidence. (*Liam L.*, *supra*, at p. 1083.) Normally, under section 388, the petitioner has the burden to make a prima facie showing that a change of circumstances exists and the proposed change of order promotes the best interest of the child to trigger the right to an evidentiary hearing.[4] (*Liam L.*, at p. 1084; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) However, the court concluded that, based on the underlying presumption in the California dependency statutory scheme that a child should be placed with his or her parents, placement with a noncustodial parent is "inherently" in the child's best interests, absent a finding of detriment. (*Liam L.*, at pp. 1073, 1085.) It then explained that "[a] noncustodial parent therefore makes a prima facie case of best interests, under section 388, when the noncustodial parent requests custody of the dependent child postdisposition." (*Id.* at p. 1085.) As such, the court held that the noncustodial parent is entitled to custody unless the party opposing placement establishes that placement with the noncustodial parent would be

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[4] Section 388, subdivision (a)(1) provides: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition . . . for a hearing to change, modify, or set aside any order of court previously made . . . . The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order . . . ." "If it appears that the best interests of the child may be promoted by the proposed change of order . . . [or] termination of jurisdiction, . . . the court shall order that a hearing be held . . . ." (§ 388, subd. (d).)

detrimental to the minor's safety, protection, or physical or emotional well-being. (*Id.* at pp. 1073–1074, 1085–1086.)

The applicability of section 361.2 to a noncustodial parent's request for custody is a question of law we review independently. (See *Jonathan P.*, *supra*, 226 Cal.App.4th at p. 1252.)

B. *The Applicability of Section 361.2, Subdivision (a)*

Relying on the above authorities, Father contends the juvenile court should have assessed his modification petition under section 361.2, subdivision (a), rather than section 388. In failing to do so, Father says, "the juvenile court misunderstood its assessment duties." Father argues the court therefore "did not consider whether it would be detrimental to place [A.B.] in [his] custody" or "whether the Agency presented clear and convincing evidence of detriment." Father's contentions are not well taken.

Father's arguments incorrectly suggest that the juvenile court did not make a finding of detriment under section 361.2, subdivision (a) in this case. It is undisputed that Father first requested custody after the disposition hearing and that the court subsequently determined that placing A.B. with him would be detrimental. Specifically, at the six-month hearing, the court expressly determined "[t]here is clear and convincing evidence that [placing A.B. with Father] . . . would be detrimental to [A.B.'s] safety, protection, or physical or emotional well-being." Father, whose counsel was present at that hearing, concedes she did not object to that finding. Indeed, Father's counsel submitted on the Agency's recommendations and expressed agreement with the court's order providing Father with reunification services. We therefore agree with the Agency that Father has forfeited appellate review of whether the juvenile court failed to apply or comply with section 361.2. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 590.)

Father attempts to avoid the forfeiture rule by asserting that the court's detriment finding was itself legally void. He argues that the court's determination was "perfunctory," was not supported by clear and convincing evidence by the Agency and, therefore, was "without legal meaning" and "cannot be considered a true detriment finding." These arguments lack merit. It seems they are directed more at a lack of substantial evidence to support the finding; they do not negate the existence of the finding. Regardless, this contention, too, has been forfeited. Father concedes he did not appeal from the order containing the detriment finding, an order that was itself appealable. (§ 395, subd. (a)(1).) By failing to appeal, Father has waived any complaint regarding the detriment finding (*In re Julie M.* (1999) 69 Cal.App.4th 41, 47), and that finding cannot now be relitigated under the res judicata doctrine (*In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705–1706; *In re Andrew L.* (2011) 192 Cal.App.4th 683, 669).[5]

Even were we to consider Father's arguments, we disagree with Father that the juvenile court erred in not applying section 361.2 to his modification petition. The authorities Father cites do not establish that the court, for a second time, was required to apply section 361.2, subdivision (a) upon the filing of his section 388 petition.

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[5] Assuming Father had not forfeited this argument, we would find that substantial evidence supports the juvenile court's detriment finding under section 361.2 and the record demonstrates the court understood it was making such a finding under the clear and convincing evidence standard. We note, however, that the record contains gaps concerning Father's history of domestic violence or any involvement with Child Protective Services in the State of Florida. Thus, although we affirm the court's denial of the section 388 petition, as fully discussed below, we expressly do *not* take the view that Father's parental fitness has been finally adjudicated and need not be revisited.

Father contends that this case presents circumstances similar to *Jonathan P.* that warrant application of the statute postdisposition. In *Jonathan P.*, *supra*, 226 Cal.App.4th 1240, the noncustodial father brought a section 388 petition after being "deprived of custody without any court ever finding that placement with him would be detrimental to the minor." (*Jonathan P.*, *supra*, at p. 1255 ["it is of great concern that a nonoffending parent, who has cooperated with the court and the Department throughout the proceedings, . . . and who appeared in the proceedings as soon as he learned of them, has been deprived of custody *without any court ever finding that placement with him would be detrimental to the minor*"], italics added; see *Suhey G.*, *supra*, 221 Cal.App.4th 732, 734–735 [court erred in setting a section 366.26 hearing without requiring the social services agency to show that the child's placement with the father would be detrimental under section 361.2].)

It is true that, like in *Jonathan P.* (and *Suhey G.*), Father is the noncustodial parent who first appeared in the dependency proceeding after disposition apparently at no fault of his own and then requested custody. But the context in which Father's section 388 petition arose is distinguishable. Here, unlike in *Jonathan P.* and *Suhey G.*, by the time Father brought his modification petition, he had already requested custody of A.B., and the court had adjudicated the detriment issue against Father, who acquiesced to the finding. *Jonathan P.* and *Suhey G.* are therefore factually inapposite and provide no basis to apply section 361.2, subdivision (a) here.

Father's reliance on *Liam L.*, *supra*, 240 Cal.App.4th 1068, is likewise misplaced. As discussed above, *Liam L.* explained that a noncustodial parent may seek custody after a disposition hearing by filing a modification petition under section 388. (*Liam L.*, at p. 1083.) The court held that, given the

underlying presumption in California's dependency scheme that a minor should be placed with a noncustodial parent, "[a] noncustodial parent therefore makes a prima facie case of best interests, under section 388, when the noncustodial parent requests custody of the dependent child postdisposition." (*Id.* at p. 1085.) Father claims that under *Liam L.*, he made a prima facie case of best interests and that the court was required to grant him custody unless the Agency proved placement was detrimental.

We are unpersuaded. The presumption of best interests in *Liam L.*, *supra,* 240 Cal.App.4th 1068, applies "absent a finding of detriment." (*Id.* at pp. 1073–1074, 1085–1086.) Here, again, there is no dispute that the court made the required detriment finding under section 361.2, subdivision (a). Thus, it cannot be said that as of the filing of Father's section 388 petition, it was "inherently" in A.B.'s best interests to be placed with Father. (*Liam L., supra,* at p. 1083.) *Liam L.* does not assist Father's position.

We therefore reject Father's argument that simply because he was originally a nonoffending, noncustodial parent, he made a presumptively adequate showing for modification that should have been more strongly rebutted by the Agency. (*Liam L.*, *supra,* 240 Cal.App.4th at pp. 1085–1086.) Accordingly, we conclude that the juvenile court did not misapply the burden of proof standards of section 361.2, as compared to section 388.

C. *The Ruling on Father's Section 388 Petition*

We now evaluate the ruling denying the petition in light of the statutory requirements in section 388. This court reviews the denial of a section 388 petition for abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) We inquire if the lower court exceeded the limits of legal discretion by making any arbitrary, capricious, or patently absurd determinations. (*In re*

Stephanie M. (1994) 7 Cal.4th 295, 318; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642.) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

In support of his petition, Father argued a change of circumstances that warranted terminating jurisdiction and placing A.B. with Father was that his whereabouts had become known since the jurisdiction and disposition hearing. He argued that the Agency had since learned that Father had been paying child support for A.B. pursuant to a Florida court order and that his status in this case was raised to presumed father. Father submitted a declaration containing statements of the same, along with a copy of the court order for child support. The juvenile court denied Father's petition, on the grounds that it failed to demonstrate a prima facie change of circumstances.

We cannot say that the court abused its discretion in denying the petition on that basis. The facts that Father raised in the petition were part of the ongoing record in the case with which the court was thoroughly familiar, not evidence of changed circumstances or new evidence. (See *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.) But even if those facts constituted "new evidence," the mere details of Father's whereabouts and his presumed status, without more, are not circumstances that sufficiently justify placing A.B. with Father and terminating jurisdiction. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 309 [procedure under section 388 accommodates the possibility that circumstance may change so as to "justify a change" in a prior order].) Thus, it was not unreasonable for the court to deny the petition for a lack of a change of circumstances. (*In re Jamika W.*, *supra*, at p. 1450 ["if the petition fails to state a change of circumstances or

new evidence that might require a change of order, the court may deny the application ex parte"].)

Assuming Father adequately showed a change of circumstances, the petition does not demonstrate how placing A.B. with Father would have promoted A.B.'s best interests (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529), other than relying on the presumption set forth in *Liam L.*, which we concluded is inapplicable under the circumstances of this case. In his reply brief, Father for the first time lists specific reasons why placement with Father would have promoted A.B.'s best interests. But because Father did not raise these arguments in the juvenile court or in his opening brief, we deem them forfeited. (See *In re Richard K.*, *supra*, 25 Cal.App.4th at p. 590; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 408.)

Even if we were to consider the arguments, we disagree with Father that he made a sufficient showing of best interests under section 388. To Father's credit, he had begun developing a relationship with A.B.; had positive interactions with her; and had participated in anger management and parenting classes. But Father does not dispute his long history of domestic violence, including being physically and verbally abusive towards Mother in the past. When asked how he would avoid domestic violence, Father provided the vague response that he would simply walk away, but could not demonstrate or verbalize how he would manage conflict in a nonphysical way. Moreover, he struggled with setting boundaries with Mother, who moved close to Father in Florida and repeatedly called him "hundreds of times" to his frustration. Based on these interactions, Father failed to show an "understanding that [Mother] is not well and is not to be trusted with [A.B.]"

In addition, Father does not dispute he was using marijuana without a medical prescription, thus risking rearrest and possibly incarceration if he were charged and convicted for possession. He also denied having a substance use problem and could not ensure that A.B. would be cared for by a sober and stable adult. Furthermore, while Father began to acknowledge A.B.'s need for mental health therapy, he was not open to feedback offered by A.B.'s therapist, at times growing agitated or dismissive towards her.

Based on these circumstances, the court could have reasonably denied the petition, on the grounds that placing A.B. with Father would not have been in her best interests.

D. *Due Process Challenges*

Father further contends he was deprived of due process when the "court continued to deny him custody of his daughter" without conducting a contested hearing on the merits. Again, we disagree. We review the claimed constitutional violation de novo. (*In re A.S.* (2009) 180 Cal.App.4th 351, 360.)

Father first argues that "[b]ecause a contested hearing was not held, the Agency was not tasked with bearing the burden of proof of proving by clear and convincing evidence it would be detrimental to place [A.B.] with [Father]" under section 361.2. Contrary to Father's assertions, the Agency in this case was tasked with this burden. Father did not contest the Agency's recommendation for the court to find that it would be detrimental to place A.B. with him. Nor did he challenge the court's adoption of that recommendation. Thus, any due process challenge concerning the lack of a contested hearing at the time the court made its detriment finding has been forfeited. (*In re Richard K.*, *supra*, 25 Cal.App.4th at p. 590.)

We also reject Father's assertion that the court's summary denial of his section 388 petition deprived him of due process. While Father discusses

cases explaining the due process rights generally afforded parties in dependency proceedings, he fails to ground his discussion within the specific context of section 388 petitions. Courts have held that the procedure of section 388 is itself constitutional. As explained in *In re Angel B.* (2002) 97 Cal.App.4th 454, the statutory scheme behind section 388 "itself is constitutional because of its many safeguards. One such safeguard . . . is that if a parent makes a prima facie showing of a change of circumstance such that a proposed change in custody *might* be in the child's best interest, then the juvenile court *must* hold a hearing."[6] (*In re Angel B.*, *supra*, at p. 461; see *In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 308–310 [recognizing the importance of section 388 in satisfying due process and fundamental fairness and explaining it provides an " 'escape mechanism' " to consider new information prior to terminating parental rights]; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 528 ["section 388 is vital to the *constitutionality* of our dependency scheme as a whole, and the termination statute, section 366.26, in particular"].)

"Thus, the real issue here is not whether this statutory scheme is constitutional, but whether [Father] made the requisite prima facie showing; if [he] did, then we shall simply reverse and direct the juvenile court to hold the hearing due process does require." (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 461.) Accordingly, the summary denial of a section 388 is not a

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[6] Section 388 does not require a juvenile court to hear argument by the parties on whether an evidentiary hearing on the petition is warranted. (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2018 ed.) Supplemental and Subsequent Petitions, § 2.140[2], pp. 2-525–2-526.) However, allowing oral argument has the advantages of ensuring the court has all the arguments in mind in order to make an informed decision and establishing a good record of the basis of its decision. (*Ibid.*; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1158, fn. 5.)

deprivation of due process unless the moving party has met his or her threshold burden of proof. (See *In re Angel B.*, *supra*, at pp. 461–462; cf. *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800 [due process violation found in ex parte denial of section 388 petition that made adequate prima facie showing of changed circumstances].)

As we determined earlier, Father's petition simply failed to make the requisite showing. Thus, his petition never triggered the right to proceed by way of a full hearing on the merits. We conclude that the court's summary denial of the petition comported with due process and the statutory mandate of section 388.

III. DISPOSITION

The juvenile court's January 30, 2020 order is affirmed.

STREETER, Acting P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.